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STATE OF ARKANSAS

Office of the Attorney General

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Attorney General

July 2, 1997

Telephone:
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The Honorable William F. Caton, Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

RE: In the Matter Of)
MCI Telecommunications Co., Inc.) CC Docket No. 97-100
Petition for Expedited Declaratory Ruling)
Preempting Arkansas Telecommunications)
Regulatory Reform Act of 1997 pursuant to)
§§ 251, 252, and 253 of the Communications)
Act of 1934, as amended)

Dear Mr. Caton:

Enclosed for filing in the above-captioned matter please find the original and twelve (12) copies of the Comments of the Arkansas Attorney General.

Also enclosed is an extra copy that I request be marked "Filed" and returned to the Arkansas Attorney General's office in the enclosed, self-addressed, postage pre-paid envelope. Thank you for your assistance and cooperation in this matter.

WINSTON BRYANT
Attorney General

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Before the
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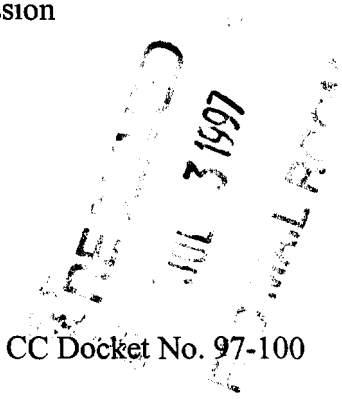
Washington, D.C. 20554



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Comments of the Arkansas Attorney General

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I. SUMMARY

Pursuant to §§ 251, 252(e)(5), 253(d), and 254(f) of the Telecommunications Act of 1996 ("the Federal Act" or "1996 Act"),[1] MCI Telecommunications Corporation ("MCI") has petitioned the Commission for an expedited declaratory ruling preempting numerous provisions of the Arkansas Telecommunications Regulatory Reform Act of 1997 ("the Arkansas Act").[2] MCI asserts that the Commission should exercise its discretion to preempt the Arkansas Act because it "erects a series of barriers to local competition that are flatly inconsistent with the requirements of federal law."[3] MCI also contends that "[n]umerous specific provisions of the Arkansas Act conflict with the federal regulatory framework created by the 1996 Act."[4]

Contrary to MCI's arguments, preemption is not warranted for several reasons. As an initial matter, MCI fails to demonstrate that it has standing to challenge the Arkansas Act. Second, MCI fails to show that the statutory requirements for preemption pursuant to §§ 253 and 252(e)(5) of the 1996 Act have been satisfied. Third, preemption of the Arkansas Act based on alleged inconsistencies with the Federal Act would exceed the scope of the Commission's preemption authority. Pursuant to its duty to maintain and defend the interests of the State, the Attorney General submits these comments and

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[1] Pub. L. 104-104, 110 Stat. 56.

[2] 1997 Ark. Acts 77, effective February 4, 1997.

[3] In the Matter of MCI Telecommunications Co., Inc., Petition for Expedited Declaratory Ruling Preempting Arkansas Telecommunications Regulatory Reform Act of 1997 pursuant to §§ 251, 252, and 253 of the Communications Act of 1934, as amended, CC Docket 97-100 (hereinafter "MCI Petition"), at 6.

[4] Id.

requests that the Commission decline to exercise its discretion to issue a declaratory ruling preempting the provisions of the Arkansas Act that MCI challenges.

II. MCI FAILS TO DEMONSTRATE THAT IT HAS STANDING TO CHALLENGE THE ARKANSAS ACT.

Pursuant to its regulatory and statutory authority, the Commission has discretion to "issue a declaratory ruling terminating a controversy or removing uncertainty."[5] Although the Article III concept of standing is not directly applicable to declaratory rulings issued by agencies,[6] the Commission nevertheless has relied upon federal courts' analysis of standing to determine whether to issue a declaratory ruling.[7] Under that analysis, MCI has not demonstrated its standing to challenge the Arkansas Act. Thus, the Commission should decline to exercise its discretion to issue the declaratory ruling that MCI seeks.

In order to have standing to seek a declaratory ruling, MCI must show that it has suffered an injury in fact that is fairly traceable to the Arkansas Act and is redressable by the relief it seeks.[8] "Injury in fact" consists of "an invasion of a legally protected interest" that is "concrete and particularized" as well as "actual or imminent, not

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[5] 47 C.F.R. § 1.2; see also 5 U.S.C. § 554(e).

[6] See Metropolitan Council of NAACP Branches v. FCC, 46 F.3d 1154, 1161 (D.C. Cir. 1995).

[7] Omnipoint Communications, Inc., 11 FCC Rcd. 10785, 10788-89 (1996).

[8] E.g., Animal League Defense Fund, Inc. v. Espy, 23 F.3d 496, 498 (D.C. Cir. 1994).

conjectural or hypothetical . . . ."[9] "Fairly traceable," in turn, means a "causal connection between the injury and the conduct complained of . . . ."[10]

In order to have standing to raise a preemption claim under the 1996 Act in particular, MCI must show that the Arkansas Public Service Commission ("APSC") has "fail[ed] to act to carry out its responsibility under [§ 252] in any proceeding or other matter under [§ 252]"[11] involving MCI, that the Arkansas Act "prohibit[s] or ha[s] the effect of prohibiting the ability of [MCI] to provide any interstate or intrastate telecommunications service[,]"[12] or that the Arkansas Act imposes requirements on MCI that are not "competitively neutral" or are inconsistent with § 254 of the 1996 Act.[13]

MCI has not alleged, much less established, that it has suffered the requisite injury in fact stemming from the Arkansas Act. MCI does not claim that the APSC has failed to carry out its responsibilities in any matter or proceeding involving MCI or any other entity for that matter. Nor has MCI claimed that the Arkansas Act has imposed any requirements on it, much less any requirements that are not competitively neutral or are inconsistent with § 254 of the 1996 Act. Indeed, nowhere in its petition does MCI allege that it offers or even intends to offer any intrastate or interstate telecommunications

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[9] E.g., Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (quotations omitted).

[10] Id.

[11] 47 U.S.C. § 252(e)(5).

[12] Id. at § 253(a); see also id., at § 253(d) (authorizing Commission preemption of state statutes, regulations, or legal requirements that violate § 253(a)).

[13] Id. at § 253(b); see also id. at § 253(d) (authorizing Commission preemption of state statutes, regulations, or legal requirements that violate § 253(b)).

services in Arkansas. In short, without any allegations indicating that a declaratory ruling will have any effect upon it, the Commission should conclude that MCI does not have standing to request such a ruling and should deny its petition on that basis alone.

III. THE COMMISSION SHOULD NOT PREEMPT THE ARKANSAS ACT BECAUSE THE CONSTITUTIONALITY OF CERTAIN PROVISIONS OF THE FEDERAL ACT IS QUESTIONABLE.

As noted above, the Commission's authority to issue declaratory rulings is discretionary. The Attorney General submits that the Commission should decline to exercise its discretion to preempt the Arkansas Act because the constitutionality of certain provisions of the 1996 Act is questionable in light of recent decisions of the United States Supreme Court.

First, to the extent that the 1996 Act purports to give the Commission jurisdiction over intrastate telecommunications, there is a question as to whether Congress properly exercised its power under the Commerce Clause to make such a grant of authority. The original Communications Act of 1934 (the "1934 Act")[14] created a dual system of federal and state regulation of telecommunications. Section 151 of the 1934 Act authorized the Commission to "regulat[e] interstate and foreign commerce in communication by wire and radio . . . ."[15] However, the authority to regulate intrastate telecommunications was expressly reserved to the states by § 152(b), which provides that "nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection

[14]48 Stat. 1064, codified at 47 U.S.C. § 151 et seq.

[15]47 U.S.C. § 151.

with intrastate communication service by wire or radio . . . ."[16] In construing these provisions, the Supreme Court indicated that § 152(b) "fences off from FCC reach or regulation intrastate matters--indeed, including matters 'in connection with' intrastate service."[17]

The Commission has stated its opinion that §§ 251, 252, and 253 of the 1996 Act create "a regulatory system that differs significantly from the dual regulatory system [Congress] established in the 1934 Act."[18] Indeed, the Commission asserts that the 1996 Act allows it to regulate historically intrastate matters, including "intrastate aspects of interconnection, services, and access to unbundled elements."[19] However, under the Supreme Court's decision in United States v. Lopez,[20] congressional findings regarding the effect of intrastate activity on interstate commerce are important to determining whether Congress may regulate intrastate matters pursuant to its Commerce Clause power. At least one commentator has questioned whether Congress made the appropriate legislative findings in the 1996 Act to grant the Commission the power, through § 253, to

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[16]Id. at § 152(b).

[17]Louisiana PSC v. FCC, 476 U.S. 355, 370 (1986).

[18]In the Matter of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket No. 96-98 (1996), at ¶ 83 (footnote omitted) (hereinafter "Local Competition Order").

[19]Id. at ¶ 84; but cf. Iowa Util. Bd. v. FCC, 109 F.3d 418, 424-25 & n.6 (8th Cir. 1996) (staying portions of Local Competition Order and citing 47 U.S.C. § 152(b)).

[20]115 S. Ct. 1624, 1631-32 (1995).

invalidate intrastate activity.[21] Thus, "Lopez brings into question the constitutional validity of section 253 of the '96 Act and the FCC's implementing regulations."[22]

Second, the Supreme Court's recent decision in Printz v. United States[23] raises a serious question as to whether portions of the 1996 Act exceed the enumerated powers of Congress and therefore violate the Tenth Amendment. In Printz, the Court invalidated sections of the Brady Handgun Violence Prevention Act that required state law-enforcement officers to make reasonable efforts to ascertain whether proposed handgun sales would be lawful. The Court found that the imposition of such duties on state officials exceeds Congress' power because the Constitution does not authorize such "[f]ederal commandeering of state governments . . . ."[24] Thus, the Court held that the "Federal government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."[25]

Several provisions of the 1996 Act are constitutionally suspect under Printz because they require state commissions to administer the Federal Act. For example, § 251(f) requires state commissions to determine whether rural telephone companies are

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[21]Douglas McFadden, Antitrust and Communications: Changes After the Telecommunications Act of 1996, 49 Fed. Comm. L.J. 457, 469-70 (1997).

[22]Id. at 471.

[23]1997 WL 351180 (U.S.).

[24]Id. at *9.

[25]Id. at *13. See also New York v. United States, 505 U.S. 144, 183-84 (1992) (holding that "take-title" provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 violated the Tenth Amendment because they compelled the states to administer a federal regulatory program).

exempt from the duties imposed on incumbent local exchange carriers ("ILECs") by § 251(c). Similarly, § 214(e)(2) mandates that state commissions designate carriers eligible to receive universal service funds. Section 252 also requires state commissions to arbitrate and approve interconnection agreements. Although the Commission has already held that § 253 of the 1996 Act does not violate the Tenth Amendment,[26] in light of the questionable constitutionality of certain provisions of the 1996 Act, the Commission should decline to preempt the Arkansas Act.

IV. STATUTORY PREEMPTION UNDER § 253(d) OF THE 1996 ACT IS NOT WARRANTED.

MCI has asked the Commission to use its discretion to preempt certain provisions of the Arkansas Act because they allegedly constitute barriers to entry in violation of § 253(d) of the 1996 Act and because they conflict with other provisions of the Federal Act. However, preemption is not appropriate under § 253(d) because MCI fails to demonstrate that the sections of the Arkansas Act that it challenges erect barriers to the provision of telecommunications services. Preemption of the Arkansas Act also is not appropriate based on alleged conflicts with the Federal Act because such preemption would exceed the Commission's statutory authority and because such conflicts have not been substantiated. Accordingly, the Commission should deny MCI's request for preemption.

A. Section 253(d) does not preempt §§ 9(d) and 9(g) of the Arkansas Act.

MCI first asserts that the restrictions on purchasing telecommunications services for resale imposed by §§ 9(d) and 9(g) of the Arkansas Act must be preempted because

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[26] See Classic Telephone, 11 FCC Rcd. 13082, 13108 (1996), petition for review docketed sub nom. City of Bogue, KS and City of Hill City, KS v. FCC, No. 96-1432 (D.C. Cir. Nov. 22, 1996).

they constitute barriers to entry in violation of § 253 of the Federal Act.[27] Section 253(a) states that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[28] Moreover, if the Commission, after notice and opportunity for public comment, finds that a state or local law does prohibit the provision of telecommunications service, it "shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency."[29]

Section 9(d) of the Arkansas Act provides that "[p]romotional prices, service packages, trial offerings, or temporary discounts offered by the local exchange carrier to its end-user customers are not required to be available for resale." Section 9(g) states that the wholesale rate to be used for the resale of telecommunications services "shall be the retail rate of the service less any avoided costs due to the resale." That section further provides that "[t]he net avoided costs shall be calculated as the total of the costs that will not be incurred by the local exchange carrier due to it selling the service for resale less any additional costs that will be incurred as a result of selling the service for the purpose of resale."[30]

As the party seeking preemption of a state law, MCI must demonstrate that there is no possible manner in which §§ 9(d) and 9(g) can be applied without prohibiting it

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[27]MCI Petition, at 6.

[28]47 U.S.C. § 253(a).

[29]Id. at § 253(d).

[30]1997 Ark. Acts 77, § 9(g).

from providing telecommunications services.[31] MCI fails to meet this burden for numerous reasons. First, the APSC has yet to construe § 9(d)'s language regarding "[p]romotional prices, service packages, trial offerings, or temporary discounts[,]" so it is not yet known what services will be available for resale. Moreover, although the Commission has found that "promotions" are one of the telecommunications services that must be offered for resale pursuant to § 251(c)(4) of the Federal Act, the Commission has not taken an expansive view of what constitutes a "promotion." Rather, the Commission stated in the Local Competition Order that, "[i]n discussing promotions here, we are only referring to price discounts from standard offerings that will remain available for resale at wholesale rates, i.e., temporary price discounts."[32]

MCI also fails to offer any economic data to demonstrate how the acquisition of "promotional prices" and "temporary discounts" at retail rates prohibits competing carriers from entering telecommunications markets and therefore mandates preemption. Instead, MCI makes only the summary allegation that "a [competing local exchange carrier] offering service through resale cannot effectively compete with ILECs unless they can obtain the service at a wholesale rate . . . ."[33] Such an unsupported assertion of harm is insufficient to compel preemption of a validly enacted state law.

B. Section 253(d) does not preempt §§ 4 and 5 of the Arkansas Act.

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[31]See, e.g., California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 581 (1987).

[32]Local Competition Order, at ¶ 948 (footnote omitted).

[33]MCI Petition, at 7.

MCI next contends that the universal service provisions in §§ 4 and 5 of the Arkansas Act should be preempted because they constitute barriers to entry in violation of § 253. Specifically, MCI objects to §§ 4(e)(4)(A), 4(e)(4)(C), and 4(e)(5), which relate to the establishment and implementation of the Arkansas Universal Service Fund ("AUSF"), and to § 5, which relates to the designation of eligible telecommunications carriers.[34]

MCI's request for preemption of these sections pursuant to § 253(d) must fail because MCI fails to demonstrate how the operation of these provisions prohibits it from entering any telecommunications market. For example, MCI does not even allege that the implementation of §§ 4 and 5 of the Arkansas Act will deny it universal service monies under either the AUSF or the federal fund. Moreover, MCI does not attempt to explain how the non-receipt of funds from either the state or federal universal service programs would prevent it from providing any telecommunications service. Indeed, it remains to be seen how §§ 4 and 5 of the Arkansas Act will operate, as the APSC is still in the process of promulgating regulations to implement these sections.[35]

Instead of attempting to show how §§ 4 and 5 of the Arkansas Act constitute barriers to entry, which is a prerequisite for preemption under § 253(d), MCI argues that these provisions are inconsistent with various sections of the Federal Act. However, such

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[34] Id. at 13-15.

[35] In the Matter of a Rulemaking Proceeding to Establish Rules and Procedures Necessary to Implement the Arkansas Universal Service Fund, APSC Docket No. 97-041-R, Order Nos. 1 and 2 (1997) (initiating rulemaking proceeding and establishing deadlines for the receipt of comments) (hereinafter "APSC Rulemaking Proceeding").

alleged inconsistencies do not fulfill the statutory grounds for preemption under § 253 of the 1996 Act. Thus, MCI's request for preemption is not justified.

V. PREEMPTION UNDER THE SUPREMACY CLAUSE

In addition to seeking preemption of the foregoing provisions of the Arkansas Act under § 253, MCI also requests that the Commission preempt those provisions and several others because they allegedly conflict with the Federal Act and therefore must be preempted under the Supremacy Clause.[36] Pursuant to the Supremacy Clause, federal law "may entail preemption of state law either by express provision, by implication, or by a conflict between federal and state law."[37] MCI contends that §§ 4, 5, 9(d), (9)(g), 9(i), and 10 of the Arkansas Act are inconsistent with the Federal Act and therefore must fall.[38] However, preemption of these provisions on this ground is not appropriate because it would exceed the Commission's statutory authority. The Supreme Court has indicated that "a federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority."[39] Indeed, "an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it."[40]

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[36]U.S. Const., art. VI, cl. 2.

[37]New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 115 S. Ct. 1671, 1676 (1995).

[38]MCI Petition, at 6, 9, 10, 13.

[39]Louisiana PSC, 476 U.S. at 374.

[40]Id.

The 1996 Act confers the power to preempt state laws on the Commission in only three narrow and well-defined instances. First, as discussed in the preceding section of these Comments, § 253(d) authorizes the Commission to preempt state laws or requirements that constitute barriers to entry and thereby prohibit the provision of telecommunications services. Second, § 253(d) also allows the Commission to preempt state laws that are not "competitively neutral" or are inconsistent with § 254 of the 1996 Act. Third, § 252(e)(5) permits the Commission to preempt a state commission's jurisdiction over arbitrations or other proceedings under that section if a state commission fails to act. Contrary to MCI's suggestions, Congress did not grant the Commission preemption authority beyond these specifically enumerated powers. Thus, preemption of the challenged provisions of the Arkansas Act based on alleged conflicts with the Federal Act would exceed the Commission's statutory authority. MCI's request for preemption of §§ 4, 5, 9(d), (9)(g), 9(i), and 10 of the Arkansas Act on this basis therefore should be denied.

Should the Commission nevertheless decide to consider this request, the text of the 1996 Act demonstrates that Congress did not intend to abrogate the traditional role that states have played in telecommunications regulation. As the Supreme Court has noted, "[t]he critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law."[41] Moreover, the Court has indicated that it does not "assume[] lightly that Congress has derogated state regulation, but instead [has] addressed claims of pre-emption with the starting presumption that Congress does

[41] Id. at 369.

not intend to supplant state law."[42] In cases in which federal law is said to bar state action in fields of traditional state regulation, the historic police powers of the states are not to be superseded by a federal act unless that is the clear and manifest purpose of Congress.[43]

The regulation of telecommunications services is a field in which the states historically have played a large and active role.[44] The Communications Act of 1934 evinced Congress' intent to preserve state authority in this area by its creation of a dual system of federal and state regulation of telecommunications. As noted previously, under the 1934 Act, the Commission regulated interstate telecommunications, and the states, pursuant to § 152(b), regulated intrastate telecommunications.[45] Significantly, Congress did not amend or repeal § 152(b) in the 1996 Act. Moreover, numerous provisions of the 1996 Act, which will be discussed below, evince Congress' intent to preserve state regulatory authority. Even MCI concedes, as it must, that the 1996 Act does not completely displace state regulation.[46] In addition, the sections of the Arkansas Act that MCI challenges have yet to be applied inconsistently with the Federal Act, so it remains to be seen whether actual conflicts exist. For all of these reasons, preemption based on purported conflicts with the Federal Act is not warranted.

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[42]New York Conf. of Blue Cross & Blue Shield Plans, 115 S. Ct. at 1676.

[43]Id.

[44]See generally, Phillip Rosario and Mark Kohler, The Telecommunications Act of 1996: A State Perspective, 29 Conn. L. Rev. 331, 331-32 (1996).

[45]See 47 U.S.C. §§ 151 and 152(b); see also section III. supra.

[46]MCI Petition, at 3.

A. Preemption of §§ 9(d) and 9(g) of the Arkansas Act is not warranted based on alleged inconsistencies with the Federal Act.

MCI argues that §§ 9(d) and 9(g) should be preempted because they directly conflict with § 251(c)(4) of the 1996 Act and with the Commission's Local Competition Order.[47] However, Congress did not intend, through § 251(c)(4), to cede total control to the Commission of the determination of resale and wholesale rates to be used in resale transactions. This intent is evident in § 251(c)(4)(B), which permits an ILEC to impose conditions and limitations on the resale of telecommunications services so long as such restrictions are not unreasonable or discriminatory. That same subsection also explicitly authorizes state commissions to prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.[48] Thus, Congress did not intend through the 1996 Act to preempt all state regulation of the resale of telecommunications services.

Sections 9(d) and 9(g) also should not be preempted because the Commission's jurisdiction to regulate the rates charged for telecommunications services is currently undecided. In a case pending before the United States Court of Appeals for the Eighth Circuit, several ILECs and state utility commissions have challenged the Commission's pricing rules in the Local Competition Order.[49] Finding that the ILECs and state commissions "have a better than even chance of convincing the court that the FCC's

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[47] Id. at 6-7.

[48] 47 U.S.C. § 251(c)(4)(B).

[49] Iowa Util. Bd., 109 F.3d at 422-23.

pricing rules conflict with the plain meaning of the Act,"[50] the Eighth Circuit issued a temporary stay blocking the operation and implementation of the pricing provisions and the "pick and choose" rule contained in the Local Competition Order.[51] Thus, until its jurisdiction to regulate resale rates for telecommunications services has been established, preemption of the provisions of the Arkansas Act relating to the resale of services is not appropriate.

In addition, §§ 9(d) and 9(g) of the Arkansas Act contain specific language indicating that the APSC should enforce those provisions in conformance with the 1996 Act. MCI provides no reason to assume that the APSC will apply §§ 9(d) and 9(g) inconsistently with the 1996 Act, and the APSC's actions belie MCI's concerns. The APSC recently ruled in an arbitration proceeding that § 251(c)(4)(A) of the 1996 Act obligated Southwestern Bell Telephone to offer for resale at wholesale rates any telecommunications services that it provides at retail to subscribers that are not telecommunications carriers.[52] The APSC effectively ruled that, except for cross-class restrictions that AT&T apparently did not contest, all other resale restrictions were presumptively unreasonable.[53] Thus, it does not appear that the APSC will interpret §§

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[50] Id. at 424.

[51] Id. at 427.

[52] In the Matter of AT& T Communications of the Southwest, Inc.'s Petition for Arbitration of Unresolved Issues with Southwestern Bell Telephone Company Pursuant to § 252(b) of the Telecommunications Act of 1996, APSC Docket No. 96-395-U, Order No. 5, at 7 (1997).

[53] Id., Order No. 5, at 9-11.

9(d) and 9(g) in a manner that conflicts with the Federal Act or the Local Competition Order.[54] MCI's request for preemption of these provisions therefore is not justified.

B. Preemption of §§ 4 and 5 of the Arkansas Act is not warranted based on alleged inconsistencies with the Federal Act.

MCI also asserts that §§ 4 and 5 of the Arkansas Act must be preempted because they "directly conflict with the commands of §§ 214(e) and 254 of the 1996 Act and this Commission's Universal Service Order."[55] MCI's complaints about these provisions, however, are premature and disregard the important role that Congress intends for the states to have in the implementation of universal service.

Section 253(b) of the 1996 Act and its legislative history demonstrate Congress' intent to preserve state authority to regulate universal service. Section 253(b) provides that states may impose, on a competitively neutral basis and consistent with the principles enunciated in § 254 of the Federal Act, requirements "necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." In addition, the Conference Committee's Joint Explanatory Statement regarding the 1996 Act expressly states that the Senate intended

> that States shall continue to have the primary role in implementing universal service for intrastate services, so long as the level of universal service provided by each State meets the minimum definition of universal service established under new section 253(b) and a State does not take any action inconsistent with the obligation for all

[54] See Local Competition Order, at ¶¶ 939, 962; see also 47 C.F.R. § 51.613(a)(1) (allowing incumbents to restrict resale of residential services to classes of customers not eligible for such services).

[55] MCI Petition, at 13.

> telecommunications carriers to contribute to the preservation and advancement of universal service under new section 253(c).[56]

The Joint Explanatory Statement further provides that "State authority with respect to universal service is specifically preserved under new section 254(f). A State may adopt any measure with respect to universal service that is not inconsistent with the Commission's rules."[57]

In addition to Congress' intent to reserve significant regulatory authority over universal service to the states, §§ 4 and 5 of the Arkansas Act should not be preempted because MCI has not demonstrated an actual conflict with the Federal Act. Although the Commission has adopted an order to implement the Federal Universal Service Fund,[58] the APSC has just begun its rulemaking process to establish the AUSF.[59] Indeed, the APSC has deferred the promulgation of regulations relating to the amount of state universal service funds to be awarded, with its staff making the following statements in its Initial Comments accompanying the proposed regulations:

> [T]he level of support incumbent local exchange carriers (ILECs) receive from interstate universal service funding mechanisms should not change materially until at least January 1, 1999 for tier one LECs and January 1, 2001 for non-tier-one LECs. Therefore, it does not appear critical that funding be available for approximately eighteen

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[56]H.R. Conf. Rep. No. 104-458, Joint Explanatory Statement of the Committee of Conference, 104th Cong., 2d Sess. (1996), reprinted in 1996 U.S.C.C.A.N. 124, 139.

[57]Id. at 143. See also 47 U.S.C. § 254(f) ("A State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service.").

[58]See In the Matter of Federal-State Joint Board on Universal Service, Report and Order, CC Docket No. 96-45 (1997).

[59]APSC Rulemaking Proceeding, Order Nos. 1 and 2.

> months at a minimum. This should provide ample time for the Commission to adopt AUSF rules, select an administrator, determine the initial amount of the AUSF, assess the telecommunications providers in Arkansas, and prepare to make AUSF funds available.[60]

Thus, until the APSC promulgates final regulations implementing the AUSF, a valid claim cannot be made that the AUSF will be administered in a manner that is not competitively neutral under § 253(b) of the 1996 Act.

C. Preemption of § 9(i) of the Arkansas Act is not warranted based on alleged inconsistencies with the Federal Act.

MCI next contends that § 9(i) of the Arkansas Act is contrary to the requirements of the Federal Act and should be preempted.[61] Section 9(i) states that the APSC "shall approve any negotiated interconnection agreement or statement of generally available terms filed pursuant to the Federal Act unless it is shown by clear and convincing evidence that the agreement or statement does not meet the minimum requirements of Section 251 of the Federal Act (47 USC 251)." MCI asserts that this provision is inconsistent with §§ 252(e) and 252(f)(2) of the 1996 Act, which relate to state-commission review of negotiated agreements and statements of generally available terms.

The text of the Federal Act once again, however, reveals that Congress did not intend to preempt state regulation of agreements relating to telecommunications services. To the contrary, Congress intends for states to be the primary regulators in this area, as it designated state commissions to approve such agreements.[62] In addition, § 251(d)(3) of

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[60]Id., General Staff's Initial Comments, at 2 (1997) (footnote omitted; citing FCC 97-157, ¶¶ 245, 294, 296, and 299-306).

[61]MCI Petition, at 8-10.

[62]See 47 U.S.C. §§ 252(e), 252(f)(2).

the 1996 Act expressly reserves powers to the states by prohibiting the Commission from precluding enforcement of a state commission order regarding access and interconnection obligations if the order is consistent with, and does not substantially prevent, implementation of § 251's requirements. Moreover, MCI fails to point to an application of § 9(i) that is inconsistent with the Federal Act. Preemption of this section is therefore neither justified nor appropriate at this time.

D. Preemption of § 10 of the Arkansas Act is not warranted based on alleged inconsistencies with the Federal Act.

MCI also challenges § 10 of the Arkansas Act, asserting that the criteria and the burden of proof that it establishes for termination of a rural telephone company's exemption from the duties imposed by §§ 251(c) and 252 of the 1996 Act are inconsistent with the purposes of the Federal Act.[63] However, the language of the 1996 Act demonstrates that Congress did not intend to preempt state participation in the determination of whether rural companies are exempt from the requirements of §§ 251(c) and 252. For example, § 251(f)(1)(B) expressly confers upon state commissions the duty to "conduct an inquiry for the purpose of determining whether to terminate the exemption" for rural telephone companies. Congress' intent to delegate this responsibility to the states also is demonstrated by the legislative history of the 1996 Act, which indicates that "State commissions are given the authority to terminate the exemption if a State commission determines that the termination of such exemption is consistent with the public interest, convenience, and necessity."[64]

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[63]MCI Petition, at 10-12.

[64]H.R. Rep. No. 104-204, 104th Cong., 1st Sess. (1995), reprinted in 1996 U.S.C.C.A.N. 10, 40.

In addition, the Commission has recognized that its role in determining exemptions for rural telephone companies, if any, is very limited. The Commission stated in the Local Competition Order that determining whether a telephone company is entitled to a § 251(f) exemption should be left to state commissions.[65] Thus, the Commission expressly declined "to try to anticipate and establish national rules for determining when [its] generally-applicable rules should not be imposed upon carriers."[66]

Finally, MCI's objections to § 10 of the Arkansas Act are premature. MCI does not allege that the APSC has applied § 10 to a bona fide request to terminate a rural telephone company's exemption in a manner that is inconsistent with the Federal Act. Given Congress' clear intent that state commissions should determine exemptions for rural telephone companies and the fact that § 10 has not been applied by the state commission charged with interpreting it, preemption of § 10 is not appropriate.

VI. STATUTORY PREEMPTION UNDER § 252 OF THE 1996 ACT

Lastly, MCI requests that the Commission preempt the APSC's jurisdiction over all § 252 arbitrations or similar proceedings and assume the responsibility of the APSC in such proceedings.[67] Pursuant to § 252(e)(1) of the 1996 Act, state commissions must approve all proposed interconnection agreements, whether such agreements are achieved by voluntary negotiation or by state mediation or arbitration. MCI states that the Arkansas Act prevents the APSC from carrying out its § 252 approval duties because it

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[65]Local Competition Order, at ¶ 1253.

[66]Id. (emphasis in original).

[67]MCI Petition, at 18-21.

prohibits the APSC from ordering further unbundling or opening of an ILEC's network except as expressly required by the Federal Act and because it "strips the [APSC] of the authority to act with respect to anything other than contract terms contained in agreements between incumbent LECs and potential competitors relating to interconnection, resale and unbundling."[68] Therefore, MCI asks the Commission to substitute itself for the APSC and perform the APSC's duties under § 252. MCI's request must be denied because it exceeds the scope of the Commission's statutory preemption authority.

The Commission's authority to preempt arbitration proceedings is set forth in § 252(e)(5), which provides as follows:

> If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

Contrary to MCI's interpretation, § 252(e)(5) does not authorize wholesale preemption by the Commission of a state commission's power to approve and arbitrate interconnection agreements. Rather, that section limits Commission preemption to specific instances in which there is an existing arbitration or agreement at issue and a state commission has failed to act.

[68] Id. at 18-19.